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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ARTHUR JOHN HERNANDEZ, Individually and as Trustee, etc., Plaintiff and Respondent, v. LAWRENCE J. HERNANDEZ, Defendant and Appellant.	A150826 (Alameda County Super. Ct. No. RP15797644)

This is an appeal from an order granting a petition to determine the construction of the Hernandez Family Trust dated June 14, 1992 (the Trust or Trust Agreement), as amended. Plaintiff Arthur John Hernandez (John)[1] sought a determination that after the death of one of the Trust's two settlors, the Trust remained revocable and subject to modification with respect to the surviving settlor's share of trust assets. Defendant Lawrence J. Hernandez (Lawrence) objected to the petition, arguing the surviving settlor was not authorized to revoke or modify the Trust after the death of his co-settlor because the Trust Agreement permitted modifications only during the settlors' "joint lifetimes."

The Trust Agreement contained a provision expressly stating: "Upon the death of either Trustor, Trust 'B' established under this Agreement shall become irrevocable and Surviving Trustor shall have no power to alter, amend or revoke it except as allowed by

[1] We refer to the Hernandez family members by distinct first names to avoid confusion. We mean no disrespect in doing so.

this Trust Agreement." There is no dispute that the Trust Agreement did not establish a "Trust 'B,' " but no extrinsic evidence was offered in the proceedings below to establish that the inclusion of this entire sentence resulted from a drafter's error or is otherwise properly disregarded. The trial court ultimately granted John's petition and found the Trust to be revocable and subject to modification after the death of a settlor.

Assuming valid grounds exist to disregard the Trust B sentence in its entirety, the Trust Agreement would permit a surviving settlor to modify its terms. On the record before us, however, the trial court's decision to disregard the Trust B sentence entirely—in the absence of any extrinsic evidence explaining the inclusion of the sentence—was inconsistent with the principles of trust interpretation and resulted in the erroneous conclusion that the Trust was modifiable by the surviving settlor. Thus, the order granting John's petition must be reversed. In remanding the matter to the trial court, we express no opinion on the propriety of considering extrinsic evidence regarding the Trust B sentence in future proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Arthur John Hernandez, Sr. (Arthur) and his wife Alice J. Hernandez (Alice) established the Trust in 1992. Arthur and Alice also served as co-trustees under the Trust. Their children, John, Lawrence, and Yvonne K. Hernandez (Yvonne), are the beneficiaries under the Trust.

Alice passed away in January 2002. Arthur passed away in October 2015.

A. The Key Provisions of the Trust

The Trust Agreement is comprised of nine articles and three amendments. Article Four, entitled "Administration of the Trust While Both Trustors Are Alive," sets forth the powers of the trustee or trustees to control and direct payments (§ 1(a)) and to add or remove Trust property (§ 1(b)).

Section 1(d) of Article Four sets forth the right of the settlors[2] to amend and revoke the Trust. It states in full: "The Trustors, during their joint lifetimes, shall have the absolute right to amend or revoke this trust, in whole or in part, at any time. Any amendment or revocation must be in writing and delivered to the Trustee(s). Upon the death of either Trustor, Trust 'B' established under this Agreement shall become irrevocable and Surviving Trustor shall have no power to alter, amend or revoke it except as allowed by this Trust Agreement."[3]

Article Five, entitled "Administration of the Trust Upon the Death of a Trustor," authorizes the trustee, on the death of a settlor, to make tax elections and various payments (i.e., funeral expenses, legally enforceable claims, estate or other taxes) out of the deceased settlor's separate estate or out of the principal of the deceased settlor's share of the community estate.

Article Six, entitled "Trust Distribution Upon Death of Trustor(s)," sets forth the distribution of trust assets upon the death of the settlors. Under the original version of the Trust instrument, Yvonne was to receive property located at 35979 Argonne Street, Newark (35979 Argonne); John was to receive property located at 35965 Argonne Street, Newark (35965 Argonne); Lawrence was to receive Pacific Bell company stock; and the remainder of the Trust assets was to be distributed equally among the three of them.

B. The Amendments to the Trust

The Trust was amended three times. In 2001, Arthur and Alice amended the Trust to provide that, upon their deaths, Yvonne would receive a life estate in 35979 Argonne,

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[2] The terms "trustor" and "settlor" are interchangeable and synonymous. (See *In re Marriage of Perry* (1997) 58 Cal.App.4th 1104, 1109.) We use "settlor" because it is consistent with the relevant sections of the Probate Code.

[3] As a general matter, a reference to a "Trust B" typically refers to one of two trusts structured under an "A-B trust." An A-B trust ordinarily divides a trust into two separate trusts upon the death of the first settlor for the purpose of avoiding estate taxes. (See *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 60.) It is undisputed that the Trust Agreement did not establish a "B" trust; nor did it contain a funding mechanism similar to an A-B trust.

and on her death, her interest would be distributed equally among Lawrence, John, and Yvonne's heirs.

In 2002, several months after Alice died, Arthur amended the Trust to provide that, upon Arthur's death, John would receive 35965 Argonne (including the contents of the house) and the balance of a Charles Schwab account; Yvonne would receive a life interest in 35979 Argonne, but if the property was sold, all proceeds would be distributed to Yvonne; Lawrence would receive a grandfather clock; and the remainder of the Trust assets would be distributed equally among the three children.

In 2003, Arthur amended the Trust again. The third amendment continued the distributions to Arthur and Yvonne as before, but it provided no specific distribution to Lawrence and excluded him from sharing in the remainder of the Trust assets unless both John and Yvonne predeceased him. Thus, Lawrence was essentially disinherited by the third amendment.

C. The Lower Court Proceedings

After Arthur passed away, Lawrence filed an original petition to determine the validity of the Trust. Thereafter, John filed a separate verified petition under Probate Code section 17200, subdivision (b)(1), to construe the Trust.[4] He sought a determination that after Alice's death, the Trust remained revocable and subject to modification with respect to Arthur's one-half share of the community property existing at the time of Alice's death. Lawrence objected to the petition and sought an order from the trial court invalidating the second and third amendments to the Trust on the ground that they were not executed by both settlors during their joint lifetimes.[5]

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[4] All further statutory references are to the Probate Code unless otherwise specified.

[5] From our review of the record, it appears that in Lawrence's petition proceeding, Lawrence's counsel and John's prior counsel requested the matter of the Trust's revocation and amendment provisions be set for an evidentiary hearing. After John's new counsel substituted in, however, John filed his separate petition in which he sought the court's interpretation of the Trust Agreement without resort to extrinsic evidence, and the instant petition arises from John's petition. Lawrence's petition proceeding is still pending.

Following oral argument, the trial court granted John's petition, but expressed some reservations about its ruling. The court entered an order finding "[t]he portion of the Hernandez Family Trust dated June 14, 1992, as amended, containing Arthur John Hernandez, Sr.'s one-half share of the community property existing at the time of Alice M. Hernandez's death remained revocable and subject to modification by Arthur John Hernandez Sr. following Alice M. Hernandez's death."

Lawrence appealed.

DISCUSSION

A. Sections 15400, 15401, and 15402

The essential question raised in this appeal is whether the surviving settlor retained the power to modify the Trust following the co-settlor's death. Here, the parties and the trial court resolved this question without regard to the third sentence of Article Four, section (d), of the Trust Agreement, which expressly stated: "Upon the death of either Trustor, Trust 'B' established under this Agreement shall become irrevocable and Surviving Trustor shall have no power to alter, amend or revoke it except as allowed by this Trust Agreement." Although we find this sentence highly significant in our de novo review of the Trust Agreement (see part B., *post*), the trial court granted John's petition after evidently concluding that sections 15400, 15401, and 15402 call for construing the agreement as allowing a surviving settlor to modify its terms. We first address the trial court's application of those three sections to the Trust Agreement, inasmuch as that issue may ultimately control the matter of the trust's post-death modifiability in the event the trial court, upon remand, properly concludes that extrinsic evidence is appropriately admitted to construe the Trust Agreement as requiring disregard of the entire third sentence.

Section 15400 governs the revocability of trusts. It states, in pertinent part: "Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor." Thus, section 15400 sets forth a presumption of trust revocability unless revocability is expressly prohibited. The term "expressly" under this statute means " 'distinctly, clearly, unmistakably, or in direct terms, as distinguished from

impliedly or inferentially.' " (*Wells Fargo Bank v. Greuner* (1964) 226 Cal.App.2d 454, 459 (*Greuner*).) In general, the power to revoke implies the power to modify. (*Heifetz v. Bank of America* (1957) 147 Cal.App.2d 776, 781–782.)

Section 15401 sets forth the procedures for trust revocations. Subdivision (a) provides that a settlor may revoke a revocable trust "by any of the following methods: [¶] (1) By compliance with any method of revocation provided in the trust instrument. [¶] (2) By a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation. If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph." (§ 15401, subd. (a)(1), (2).)

Section 15402, which concerns the procedure for trust modifications, states in full: "Unless the trust instrument provides otherwise, if a trust is revocable, the settlor may modify the trust by the procedure for revocation."

In their original briefing, the parties mostly ignored the third sentence of Article IV, section 1(d), and its reference to the irrevocability of a "Trust 'B' " after the death of a settlor. Instead, they focused on the first two sentences of section 1(d) to interpret the Trust Agreement. Under this approach (but subject to the discussion in part B., *post*), we conclude that sections 15400, 15401, and 15402 permitted Arthur, as the surviving settlor, to modify the Trust Agreement "by a writing . . . delivered to the trustee during the lifetime of the settlor," as set forth in section 15401.

As indicated, section 15402 allows a settlor to modify a trust by the procedure for revocation if two requirements are satisfied: (1) the trust is revocable; and (2) the trust instrument does not provide otherwise. We address these requirements in turn.

First, to determine whether the Trust was revocable after Alice's death, we look to section 15400, which provides that a trust "is revocable by the settlor" unless the trust is "expressly made irrevocable by the trust instrument." Setting aside for purposes of this discussion the third sentence of Article IV, section 1(d), we observe the Trust Agreement contained no other language "expressly" (i.e., distinctly, clearly, unmistakably, directly)

prohibiting its revocation or modification after the death of a settlor. (§ 15400; *Greuner, supra,* 226 Cal.App.2d at p. 459.) Because section 15400's presumption of trust revocability was not rebutted by any express language in the Trust Agreement, section 15402's requirement of a revocable trust has been satisfied.

On this point, Lawrence argues the phrase "during their joint lifetimes" in the first sentence of Article IV, section 1(d), is reasonably construed as limiting the power to revoke (and hence, the power to modify) to the period when both settlors were alive, and therefore as prohibiting revocation (and hence, modification) after the death of a settlor. However, this argument is unavailing because implicit or inferential language does not satisfy the statutory requirement of section 15400. (*Greuner*, *supra*, 226 Cal.App.2d at p. 459.)

Having determined the Trust was revocable after Alice's death, we next determine whether Arthur, as the surviving settlor, could validly modify the Trust "by a writing . . . delivered to the trustee during the lifetime of the settlor," as set forth in section 15401. Section 15402 provides that a revocable trust may be modified using the procedures listed in section 15401 "[u]nless the trust instrument provides otherwise." As indicated, the power to revoke generally implies the power to modify (*Heifetz v. Bank of America*, *supra*, 147 Cal.App.2d at pp. 781–782), and section 15402 codifies this general rule (Cal. Law Revision Com. com., 54 West's Ann. Prob. Code (1991) foll. § 15402, p. 575). Here, the Trust Agreement did not "provide otherwise" within the meaning of section 15402 because it did not specify a procedure for modification that differed from the procedure for revocation specified either in section 15401 or in the instrument itself. Rather, the Trust Agreement's specified procedure for modification and revocation were identical to each other and to the procedure specified in section 15401: Any amendment or revocation by a settlor could be in writing and delivered to the trustee during the lifetime of the settlor.

Lawrence does not contend the modification and revocation procedures of the Trust Agreement are substantively different with regards to the modification procedure employed by Arthur in this case. Rather, he contends the modification provision should

be interpreted differently because there is no presumption of trust modifiability analogous to section 15400's presumption of trust revocability. Thus, his argument goes, even if the "joint lifetimes" language in Article IV, section 1(d), when read in conjunction with the second sentence of the article, did not suffice as an exclusive method of revocation, it was enough to qualify as an exclusive method for modification. This argument relies heavily on *King v. Lynch* (2012) 204 Cal.App.4th 1186 (*King*) and its observation that the Legislature chose to differentiate between revocation and modification when it enacted separate statutory sections for them.

King's analysis is not helpful in resolving the matter before us. In *King*, there was no question the subject trust was modifiable in the circumstances presented, but its procedure for modification was substantially different from its procedure for revocation and also different from the procedures articulated in section 15401. That is, the trust instrument's modification provision required signatures of *both settlors* for trust amendments, while the signature of *either settlor* would have been sufficient for a revocation under either the trust instrument or section 15401. (See *King*, *supra*, 204 Cal.App.4th at pp. 1188–1189; § 15401.) On those facts, *King* addressed whether the specified procedure for modification requiring both settlors' signatures had to be followed even though the trust instrument did not expressly make that procedure exclusive. In concluding that both settlors' signatures were required for modification, the court compared the language of section 15401, subdivision (a)(2), and that of section 15402, and observed the Legislature chose to require explicit language of exclusivity for a specified *revocation* method, but not for a specified *modification* method. "[A]s is evident from section 15401, the Legislature knew how to limit the exclusivity of a revocation method provided in a trust and chose not to impose such a limitation on modifications in section 15402." (*King*, *supra*, at p. 1193.)

Here, both the Trust Agreement and section 15401 permit a settlor to revoke the terms of the Trust by a writing that is delivered to the trustee during the lifetime of the settlor. Thus, the trust instrument's specified procedure for *modification* matched the procedure for revocation in section 15401, and also the trust instrument's specified

method for revocation. Consequently, neither *King* nor section 15402 barred Arthur, as a settlor, from amending the Trust Agreement in that manner. Lawrence's argument to the contrary would lead to the anomalous result that, in a case such as this where the terms of the trust instrument do not provide otherwise, the settlors' power to modify the Trust would be constrained while the greater power of revocation from which it derives is not.

B. De Novo Review of the Trust Agreement

As we have stated, the discussion above assumes the proper disregard of the entire third sentence of Article Four, section 1(d), which states: "Upon the death of either Trustor, Trust 'B' established under this Agreement shall become irrevocable and Surviving Trustor shall have no power to alter, amend or revoke it except as allowed by this Trust Agreement." On the record before us, however, disregard of the entire third sentence, in the absence of any extrinsic evidence of a drafter's error or other basis for its disregard, is inconsistent with the principles of trust interpretation. As we shall explain, the order granting John's petition must be reversed on this ground.

The trial court based its construction of the Trust Agreement solely on the terms of the instrument itself and without the aid of extrinsic evidence. Under these circumstances, we are not bound by the trial court's interpretation, and we proceed to make a final de novo determination in accordance with the applicable principles of law. (*Estate of Platt* (1942) 21 Cal.2d 343, 352; *Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 381.)

In construing a trust instrument, the court must, if possible, ascertain and effectuate the intention of the settlors as expressed by the language of the instrument itself. (*Ephraim v. Metropolitan Trust Co.* (1946) 28 Cal.2d 824, 834; *Title Ins. & Trust Co. v. Duffill* (1923) 191 Cal. 629, 642 (*Duffill*).) "The only intention this court is authorized to declare is such as may be deduced from an interpretation of the instrument which was drawn and executed by the parties to express their intention [citation], which must be gathered from the general purpose and scope of the agreement." (*Duffill*, at p. 642.)

"The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative." (§ 21120.) "All parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument." (§ 21121.) "In construing a trust instrument, the intent of the trustor prevails and it must be ascertained from the whole of the trust instrument, not just separate parts of it." (*Scharlin v. Superior Court* (1992) 9 Cal.App.4th 162, 168.)

Putting aside, for the moment, the reference to "Trust 'B' " in the third sentence of Article Four, section 1(d), we have no trouble concluding the sentence otherwise " 'distinctly, clearly, unmistakably, or in direct terms' " expresses the intended irrevocability and non-modifiability of the affected trust after the death of a settlor for purposes of sections 15400 and 15402. (§§ 15400, 15402; *Greuner*, *supra*, 226 Cal.App.2d at p. 459.) But because there is no dispute that the trust instrument did not establish a "B" trust, it is unclear what the settlors intended in referring to "Trust 'B' established under this Agreement."

We requested and received supplemental briefing from the parties on whether disregarding the third sentence of Article Four, section 1(d), in its entirety, or construing it to contain a correctible misdescription, or giving it some other effect, best reflects and effectuates the settlors' intent consistent with the rules of construction of trusts. In his supplemental briefing, Lawrence argues the settlors' intent is best effectuated by construing the third sentence to contain a correctible misdescription of the affected trust, i.e., that the phrase "Trust 'B' established under this Agreement" should be corrected to read "the Trust established under this Agreement." John argues Lawrence forfeited this argument by failing to raise it with the trial court and in his initial briefing on appeal. John further contends Lawrence's new argument contradicts statements he has previously made.

We have discretion to consider new arguments on appeal raising pure questions of law (*Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1709), and we disagree that Lawrence took a contradictory position before the trial court. The record demonstrates that Lawrence simply acknowledged, as he does on appeal, that no Trust B was established under the Trust Agreement. At no point did Lawrence agree that the entire third sentence of Article Four, section 1(d) must be disregarded.

Because the Probate Code demands that we give every expression in the Trust Agreement some effect (§ 21120), we are not inclined to simply disregard the third sentence. Furthermore, we cannot reasonably construe the third sentence as providing for the irrevocability of a non-existent trust, as that would render the sentence wholly inoperative. (*Ibid*.) While it is possible the settlors did not intend to include that sentence, and instead intended to allow the surviving settlor the unfettered ability to revoke or modify the Trust after the co-settlor's death, such intentions are not apparent from the face of the writing. Indeed, any intent not to include the third sentence and its prohibitions is belied by their presence. At best, the trust instrument may contain a latent ambiguity "which is not apparent on the face of the [instrument] but is disclosed by some fact collateral to it." (*Estate of Russell* (1968) 69 Cal.2d 200, 207.) " 'It is settled doctrine that as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence.' " (*Estate of McDonald* (1961) 191 Cal.App.2d 565, 570.) Here, however, no extrinsic evidence was introduced to disclose a latent ambiguity or explain away the Trust Agreement's inclusion of the third sentence of section 1(d).

We acknowledge the third sentence's reference to "Trust 'B' established under this Agreement" does not precisely correspond to the trust established by the instrument. Under these circumstances, however, the most reasonable interpretation of that sentence is that the affected trust was misdescribed in the instrument as "Trust 'B.' "

It has long been settled that a court may correct a misdescription in a will or trust. (*Taylor v. McCowen* (1908) 154 Cal. 798, 802 (*Taylor*); *Estate of Heins* (1933)

132 Cal.App. 131, 133.)[6] "Where [an instrument] consists of a misdescription . . . if the misdescription can be struck out and enough remain in the [instrument] to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected." (*Taylor*, *supra*, at p. 802.) Here, the misdescription (i.e., the "B" in "Trust 'B' ") can be struck out, with enough remaining in the provision to identify the affected trust as the one and only trust "established under this Agreement." As corrected, the sentence can be read: "Upon the death of either Trustor, the Trust established under this Agreement shall become irrevocable and Surviving Trustor shall have no power to alter, amend or revoke it except as allowed by this Trust Agreement."

Our interpretation does not impermissibly rewrite the Trust Agreement or change the expressed intention of the settlors. (See *Estate of McDonald*, *supra,* 191 Cal.App.2d at p. 570.) There is no dispute that the explicit reference to "Trust 'B' established under this Agreement" is erroneous, as the trust instrument did not establish any trust under that precise characterization. Yet, by including the third sentence of section 1(d), the settlors intended to make *a trust established by the agreement* irrevocable and not subject to alteration or amendment upon either of their deaths. In striking out the reference to a "B" trust, we are reconciling the obvious misdescription of the trust "established under this Agreement" and giving effect to the restrictive clause in the third sentence by applying it to the only trust actually established.

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[6] The cases addressing misdescription typically involve latent ambiguities caused by the misnaming of a person or gift under an instrument such as a will. (See *Taylor*, *supra*, at p. 799 [will used wrong middle initial for testatrix's nephew]; *Estate of Heins*, *supra*, at pp. 132–133 [will erroneously bequeathed "common" stock in company even though testator owned only preferred stock].) But the general power to correct misdescriptions by disregarding mistakes in a written instrument also applies where, as here, a trust instrument contains an obvious mistake regarding the description of the affected trust. (Civ. Code, §§ 1640 [when written contract through mistake fails to express real intention of parties, erroneous parts are to be disregarded], 1653 [words in contract inconsistent with main intention of parties are to be rejected]; *Estate of Ryan* (1950) 96 Cal.App.2d 787, 792 [applying rules for interpreting contracts to trust].)

Furthermore, our interpretation harmonizes the three sentences of section 1(d) of Article Four "to form a consistent whole." (§ 21121.) The first sentence establishes the rights of the settlors to revoke and modify the trust during their joint lifetimes, and the second sentence establishes the procedure for exercising those rights. The third sentence then states expressly—as is necessary under section 15400—that after the death of a settlor, when the settlors are no longer jointly living, the previously-discussed rights and the procedure for exercising those rights are no longer available, and the Trust becomes irrevocable and no longer subject to modification. Read thusly, the provision barring post-death revocation, alteration, or amendment of the Trust flows directly from the prior two sentences, and the settlors' intent is furthered by correcting the obvious misdescription of the affected trust rather than disregarding the sentence in its entirety.

Accordingly, in the absence of properly admitted extrinsic evidence requiring disregard of the third sentence, the terms of the Trust Agreement foreclose application of sections 15400, 15401, and 15402 to establish post-death modifiability. That is, Arthur was not permitted under section 15402 to use the procedure for revocation to modify the Trust after Alice's death because: (1) the Trust Agreement was "expressly" made irrevocable after the death of a settlor within the meaning of section 15400; and (2) the Trust Agreement "provide[d] otherwise" within the meaning of section 15402 by prohibiting modification after the death of a settlor.

For these reasons, we conclude the decision of the trial court to grant John's petition—in disregard of the entire third sentence of Article Four, section 1(d), in the absence of any properly admitted extrinsic evidence requiring such disregard—was erroneous and must be reversed. On remand, the trial court may determine the propriety of allowing extrinsic evidence to explain the presence of the third sentence, which may affect the proper construction of the Trust Agreement.

DISPOSITION

The order granting the petition for construction is reversed, and the matter is remanded for further proceedings not inconsistent with this opinion. In the interests of justice, each party shall bear its own costs on appeal.

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Fujisaki, J.

WE CONCUR:

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Siggins, P.J.

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Petrou, J.

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